

# Detailed Answers to Frequently Asked Questions about Estate Planning

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## **What is an Estate Plan?**

An estate plan generally includes a will along with other documents working together to help maximize your control of the distribution of your assets, while minimizing taxes and strain on your family. It is a statement of what you want to happen to your family, your assets and your remains once you are gone. There are many documents that can consist of an estate plan, such as a will, trusts, a power of attorney, a living will, beneficiary designations of various insurance and retirement accounts that work together along with your various types of assets to plan for the smooth and efficient transfer upon your death. Effective estate planning takes into account the laws of wills, taxes, insurance, property and trusts so as to gain maximum benefit of all laws while carrying out the person's own wishes for the disposition of his property upon his death.

There are many common goals of estate planning, such as avoiding probate, providing for minor children, tax planning, etc. Depending upon the goals of the client, as well as the nature and quantity of assets/debts, the documents necessary to properly plan the estate for transfer can vary. Some estate plans are relatively simple, but others are not. Don't assume that just because you are leaving everything to a spouse or child that your estate is simple. Come to the Law Office of Robert L. Shepard for a free consultation and if your estate plan is something you can do yourself, we will tell you, and even tell you how to do it.

## **Does everyone need an estate plan?**

Yes, everyone will benefit from proper estate planning, simply because everyone will eventually pass away. No, not everyone needs a complicated estate plan, and certainly everyone does not need to hire a lawyer. To determine if an estate plan is right for you, The Law Office of Robert L. Shepard will review your goals and assets as part of your free initial consultation. While it is certainly true that the older you are and the more assets you have the more you will benefit from estate planning, everyone should consider their options to ensure your wishes are carried out.

By not having an estate plan, the government decides who receives your assets upon death. They also take a hefty percentage for themselves. If you have minor children, they receive their inheritance at age 18. Consider how responsible you were at that age and ask if you want your children to own a home at that age. The most common reason people give for not having an estate plan is thinking they don't have enough money to make planning worthwhile. This commonly held belief simply isn't true, and it is the hard working but not wealth people that hold this belief that pay the greatest amount to the courts and lawyers for not having properly planned. Think about it, if wealthy Americans take estate planning seriously, it is because it is a good thing, and not planning for it gets expensive.

Not having an estate plan is akin to not planning for retirement, not planning for a career, not planning for anything. A good estate plan isn't a critical life necessity the way food and water is, but planning for life's events sure does improve its quality.

## What happens if I do not have an estate plan?

If you do not have any estate planning then your family will most likely need to probate most of your estate. Probate is the legal process in which the state gathers your assets, pays any creditors, and distributes any remaining assets based upon the laws of California. Probate often is expensive, complicated and time-consuming process. If you do not have an estate plan, then you die intestate, and your assets are distributed under the rules of Intestate Succession. This is the default distribution scheme by which the recipients of your probate estate are chosen.

Certain types of assets avoid probate on their own, and they are called “will substitutes.” Most retirement plans and insurance policies wherein you designate a beneficiary as part of the plan/policy pass directly to that beneficiary. Typically a beneficiary simply submits a claim form along with a death certificate and the company sends the beneficiary a check.

Another will substitute is real property that is held in joint tenancy or as community property with right of survivorship. If real property is owned this way, the surviving owner simply files an affidavit of death with the county recorder and a new deed perfecting title in their name.

An often overlooked will substitute is for any financial account, be it a simple checking account to an entire investment portfolio. With any financial account you can designate what is called a pay-on-death (POD) or transfer-on-death (TOD) beneficiary. This generally does not cost you anything to do and something you do yourself at your financial institution. Unlike a joint account in which both parties have access during their lifetime, a POD or TOD does not give anyone access while you are alive, but enables the direct transfer of whatever money is in the account upon your death.

A final type of will substitute is an inter-vivos trust, sometimes called living trusts. These are discussed in detail in other questions, but share the common feature of all will substitutes in that they avoid probate, which means no court, no legal fees and no waiting.

## What is Intestate Succession?

If you die without a will, then you are said to have died intestate. The rules of intestate succession are basically a default pecking order of who gets your assets. It is the same scheme for every person, but obviously everyone has a different family picture of who is important in his or her life. The rules of California Intestate Succession can be broken into two main steps:

**STEP ONE** pursuant to California Probate Code §6401: Applied if the decedent (the person who passed away) was married at the time of their death. If the decedent was not married, skip to step two. The distribution varies depending on the types of property involved:

1. **Community Property** – The surviving spouse will own all community property, as half of it was already theirs, and the other half becomes theirs after passing through probate.

2. **Quasi Community Property** – This is simply property that would have been Community Property under California law but was acquired in a separate property state. Under California law, it is treated identically to Community Property.
3. **Separate Property** – The surviving spouse could end up with all, half or one third of the Separate Property depending on the family situation:
  - a. The spouse gets all the Separate Property if there are no descendants or first line relatives; no issue and neither parent is still alive and no descendants of parents still alive (no brothers or sisters, nieces and nephews).
  - b. The spouse gets one half of the Separate Property if there is either one blood line of descendants OR no descendants but there are first line relatives (deceased spouse had only one child, or if no descendants, the deceased spouse left at least one parent or descendant of parent (brothers, sisters)).
  - c. The spouse gets one third of the Separate Property if there are two or more blood lines of descendants still alive (deceased spouse leaves more than one surviving child, one child and issue of deceased child, issue of several deceased child; must have at least 2 or more surviving blood lines).
  - d. Any separate property remaining passes as if there were no surviving spouse, under step 2, below.

**STEP TWO** pursuant to California Probate Code §6402: The following is the priority order for determining heirs under the California intestate distribution scheme.

1. Descendants (lineal) - children, great grandchildren, etc. (California follows per capita with representation - divide into initial shares at first generation with surviving members. California Probate Code §240)
2. Parents - half to each or all to surviving parent.
3. Descendants of parents - brothers and sisters and nieces and nephews, which goes to descendants of parents per capita with representation.
4. Grandparents and their descendants – if there are four grandparents alive then each get a fourth, three each a third, two get half each, one grandparent left gets all; no equality between sides of the family.
5. If all the grandparents are deceased then it goes to aunts and uncles by per capita with representation.
6. Former step children and descendants (step children that were not treated as real child) - children of the predeceased spouse.
7. Next of kin – California uses civil law with a parental preference rule.
8. Deceased spouses parents and their descendants.
9. Escheat to the California government - final step, if no heirs can be found at all. This rarely happens in California, but yes, if you have no heirs and you make no estate plan, then the State of California takes your assets for itself.

Under California Law, Community Property consists of the assets acquired during marriage, with the exception of gifts and inheritance. Assets acquired before marriage or after the date of

separation are considered Separate Property. If Community Property and Separate Property get commingled together, then the court presumes that the assets are all Community Property and the party claiming a Separate Property interest has the burden of proof to show otherwise.

### What documents are included in an Estate Plan?

Estate plans most often consist of a trust, will and often power of attorneys or living wills. An estate plan also helps to coordinate retirement funds, IRA's, beneficiary designations on bank accounts and life insurance policies.

A will is an instrument by which a person makes a disposition of their real and personal property, to take effect after their death, and which by its own nature is ambulatory and revocable.

A living trust is a tool most often used to avoid probate by transferring assets into the trust (a separate legal entity) and then naming yourself as trustee of that trust. Once you pass away, the successor trustee then has instruction on to who to transfer the trust assets.

A power of attorney is a document by which you give another person the ability to make medical decisions for you when you are unable.

A living will is a set of pre-written instructions regarding life-sustaining measures you would want to receive or not receive and under what conditions.

Retirement accounts and life insurance policies distribute directly to the beneficiaries, and other financial accounts can be set up to work this way as well.

Each estate plan is different, depending on the goals, priorities and wishes, along with the nature and quantity of assets. The Law Office of Robert L. Shepard can help you decide which documents are right for you.

### What is the California Statutory Will Act?

This statute was enacted to streamline and simplify the drafting of wills. While it is not a custom will ideal for every situation, it covers the most common areas and ensures many of your wishes will be carried out.

#### INSTRUCTIONS

- 1. READ THE WILL.** Read the whole Will first. If you do not understand something, ask a lawyer to explain it to you.
- 2. FILL IN THE BLANKS.** Fill in the blanks. Follow the instructions in the form carefully. Do not add any words to the Will (except for filling in blanks) or cross out any words.
- 3. DATE AND SIGN THE WILL AND HAVE TWO WITNESSES SIGN IT.** Date and sign the Will and have two witnesses sign it. You and the witnesses should read and follow the Notice to Witnesses found at the end of this Will.

CALIFORNIA STATUTORY WILL OF \_\_\_\_\_  
(Print Your Full Name)

- 1. Will. This is my Will. I revoke all prior Wills and codicils.
- 2. Specific Gift of Personal Residence (Optional - use only if you want to give your personal residence to a different person or persons than you give the balance of your assets to under paragraph 5 below). I give my interest in my principal personal residence at the time of my death (subject to mortgages and liens) as follows:

*(Select one choice only and sign on the line after your choice).*

- a. Choice One: All to my spouse, if my spouse survives me; otherwise to my descendants (my children and the descendants of my children) who survive me.  
\_\_\_\_\_
- b. Choice Two: Nothing to my spouse; all to my descendants (my children and the descendants of my children) who survive me.  
\_\_\_\_\_
- c. Choice Three: All to the following person if he or she survives me: (Insert the name of the person): \_\_\_\_\_
- d. Choice Four: Equally among the following persons who survive me: (Insert the names of two or more persons):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 3. Specific Gift of Automobiles, Household and Personal *Effects (Optional--use only if you want to give automobiles and household and personal effects to a different person or persons than you give the balance of your assets to under paragraph 5 below)*. I give all of my automobiles (subject to loans), furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death as follows:

*(Select one choice only and sign on the line after your choice).*

- a. Choice One: All to my spouse, if my spouse survives me; otherwise to my descendants (my children and the descendants of my children) who survive me.  
\_\_\_\_\_
- b. Choice Two: Nothing to my spouse; all to my descendants (my children and the descendants of my children) who survive me.  
\_\_\_\_\_

- c. Choice Three: All to the following person if he or she survives me: (Insert the name of the person): \_\_\_\_\_
- d. Choice Four: Equally among the following persons who survive me: (Insert the names of two or more persons):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

4. Specific Gifts of Cash. *(Optional)* I make the following cash gifts to the persons named below who survive me, or to the named charity, and I sign my name in the box after each gift. If I don't sign in the box, I do not make a gift. (Sign in the box after each gift you make.)

Name of Person or Charity to receive gift (name one per line only – please print)

\_\_\_\_\_

Amount of Cash Gift

Signature

\_\_\_\_\_

Name of Person or Charity to receive gift (name one per line only – please print)

\_\_\_\_\_

Amount of Cash Gift

Signature

\_\_\_\_\_

Name of Person or Charity to receive gift (name one per line only – please print)

\_\_\_\_\_

Amount of Cash Gift

Signature

\_\_\_\_\_

Name of Person or Charity to receive gift (name one per line only – please print)

\_\_\_\_\_

Amount of Cash Gift

\_\_\_\_\_

Signature

\_\_\_\_\_

Name of Person or Charity to receive gift (name one per line only – please print)

\_\_\_\_\_

Amount of Cash Gift

\_\_\_\_\_

Signature

\_\_\_\_\_

5. Balance of My Assets. Except for the specific gifts made in paragraphs 2, 3 and 4 above, I give the balance of my assets as follows:

(Select one choice only and sign on the line after your choice. If I sign in more than one box or if I don't sign in any box, the court will distribute my assets as if I did not make a Will).

a. Choice One: All to my spouse, if my spouse survives me; otherwise to my descendants (my children and the descendants of my children) who survive me.

b. Choice Two: Nothing to my spouse; all to my descendants (my children and the descendants of my children) who survive me.

c. Choice Three: All to the following person if he or she survives me: (Insert the name of the person): \_\_\_\_\_

d. Choice Four: Equally among the following persons who survive me: (Insert the names of two or more persons):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Guardian of the Child's Person. If I have a child under age 18 and the child does not have a living parent at my death, I nominate the individual named below as First Choice as guardian of the person of such child (to raise the child). If the First Choice does not serve, then I nominate the Second Choice, and then the Third Choice, to serve. Only an individual (not a bank or trust company) may serve.

Name of First Choice for Guardian of the Person: \_\_\_\_\_

Name of Second Choice for Guardian of the Person: \_\_\_\_\_

Name of Third Choice for Guardian of the Person: \_\_\_\_\_

7. Special Provision for Property of Persons Under Age 25. *(Optional--Unless you use this paragraph, assets that go to a child or other person who is under age 18 may be given to the*

*parent of the person, or to the Guardian named in paragraph 6 above as guardian of the person until age 18, and the court will require a bond; and assets that go to a child or other person who is age 18 or older will be given outright to the person. By using this paragraph you may provide that a custodian will hold the assets for the person until the person reaches any age between 18 and 25 which you choose).* If a beneficiary of this Will is between age 18 and 25, I nominate the individual or bank or trust company named below as First Choice as custodian of the property. If the First Choice does not serve, then I nominate the Second Choice, and then the Third Choice, to serve.

Name of First Choice for Custodian of Assets: \_\_\_\_\_

Name of Second Choice for Custodian of Assets: \_\_\_\_\_

Name of Third Choice for Custodian of Assets: \_\_\_\_\_

Insert any age between 18 and 25 as the age for the person to receive the property: (If you do not choose an age, age 18 will apply.): \_\_\_\_\_

8. I nominate the individual or bank or trust company named below as First Choice as executor. If the First Choice does not serve, then I nominate the Second Choice, and then the Third Choice, to serve.

Name of First Choice for Executor: \_\_\_\_\_

Name of Second Choice for Executor: \_\_\_\_\_

Name of Third Choice for Executor: \_\_\_\_\_

9. Bond. My signature in this box means a bond is not required for any person named as executor. A bond may be required if I do not sign on this line:

No bond shall be required: \_\_\_\_\_

*(Notice: You must sign this Will in the presence of two (2) adult witnesses. The witnesses must sign their names in your presence and in each other's presence. You must first read to them the following two sentences.)*

This is my Will. I ask the persons who sign below to be my witnesses.

Signed on \_\_\_\_\_ at \_\_\_\_\_, California  
(date) (city)

\_\_\_\_\_  
Signature of Maker of Will

*(Notice to Witnesses: Two (2) adults must sign as witnesses. Each witness must read the following clause before signing. The witnesses should not receive assets under this Will.)*

Each of us declares under penalty of perjury under the laws of the State of California that the following is true and correct:

- a. On the date written below the maker of this Will declared to us that this instrument was the maker's Will and requested us to act as witnesses to it;
- b. We understand this is the maker's Will;
- c. The maker signed this Will in our presence, all of us being present at the same time;
- d. We now, at the maker's request, and in the maker's and each other's presence, sign below as witnesses;
- e. We believe the maker is of sound mind and memory;
- f. We believe that this Will was not procured by duress, menace, fraud or undue influence;
- g. The maker is age 18 or older; and
- h. Each of us is now age 18 or older, is a competent witness, and resides at the address set forth after his or her name.

Dated: \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Residence Address

Dated: \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Residence Address

**AT LEAST TWO WITNESSES MUST SIGN  
NOTARIZATION ALONE IS NOT SUFFICIENT**

## **What is a holographic will?**

A holographic will is not legal in most states, but California does allow them. They are informal wills in which the material terms must be all done in the testator's own handwriting, and must be signed by the testator. This means either the entire document is in the testator's handwriting or most fill-in-the-blank style forms will constitute a holographic will. No witnesses are required for a holographic will. The Law Office of Robert L. Shepard does not recommend the use of a holographic will. It is not that they are legally ineffective, but under California Probate Code §6111, there are a few legally significant differences between a holographic will versus one that was formally attested to.

For example, if a holographic will does not contain a statement as to the date of its execution and this results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, then the holographic will is the one that is held invalid unless the time of its execution is established to be after the date of execution of the other will.

Also, if it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity. Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will.

The point is, holographic wills are viewed with suspicion by the court, so you are better off not using one unless you simply have no choice.

## **What is a Trust?**

A trust is a fiduciary relationship with respect to certain property wherein the trustee holds legal title subject to enforceable equitable rights of the beneficiary. As a professor of Wills and Trusts, this is an excellent legal definition of a trust that I give to all my students. However, when explaining what a trust is to the general public, a different approach is needed. Think of a trust as a separate legal person. The trust can hold property, enter into agreements, sue and be sued, pretty much anything an actual person can do.

The way a standard revocable living trust works is that you transfer your assets into a trust. You no longer own them, the trust does. Usually, but not always, you name yourself as the trustee, the person who controls the trust. When you pass away, you do not own the trust assets, and so they do not have to pass through your probate. A successor trustee is given power, generally with instruction to transfer the assets to other beneficiaries, although sometimes the trust continues to manage the assets for a time.

At its core, a trust essentially separates legal ownership from beneficial ownership. The trust property is owned by the trust and controlled by the trustee. However, the trust property must be used for the benefit of the beneficiary, and if it is not, the beneficiary has rights and can have

the trustee removed from power. This division of ownership has many beneficial applications in estate planning.

### **What are Durable Power Documents?**

Durable power documents, such as a Durable Health Care Power of Attorney allow you to designate a party to communicate your express wishes. Durable power documents are often included in estate plans. When a document is titled “durable,” this means that it remains effective even after you lose your mental or physical capacity. Such a condition is rarely planned for but more common than you might think. Even something as common as a stroke might make you temporarily incapacitated, even though you are likely to regain your capacity later. If such a document is created while you do have capacity, the courts and hospitals will honor the decisions of your appointed agent (usually called attorney-in-fact).

Making such documents are a fairly straightforward process legally. However, deciding whom to appoint as your agent is often one of the most difficult decision a person makes. Appointing two people to act simultaneously is problematic in the event they disagree on a particular decision. Spouses or children make natural candidates for this role, but close friends are sometimes a better choice, particularly if none of the family live nearby. It is also important to consider if that person will carry out your wishes, or if they will be too influenced by their own.

Making a Durable Health Care Power of Attorney can help prevent you from being conserved against your wishes later on. If you lose your capacity and have not done any planning, what can happen is that Adult Protective Services can come in and have you placed into an involuntary Conservatorship. Essentially the government evaluates your ability to care for yourself, and if you don't meet their standards, they will seize your assets and spend the money for your care. Often this involves selling your real estate and placing you into a retirement home. There is certainly a good and bad side to this, but the point is if you take care of yourself by appointing another to help in that situation, your wishes will be honored.

### **What type of Trust is right for me?**

There are many types of trusts, depending on the client's goals. The Law Office of Robert L. Shepard is well versed in all manner of trusts, and will meet with you and help you decide which trust is correct for you. It really depends on what your goals are. There are so many different types of trusts; this page could easily be an entire book. The six most common goals of making a trust are:

1. Avoid Probate
2. Provide for minor children
3. Allow for flexibility
4. Protection from creditors
5. Planning for incapacity
6. Tax reduction / elimination

Even once you know what type of trust you want, there are no fill-in-the-blank style trusts. They exist, yes, but they are less than worthless. In fact, they can be downright harmful. If you are considering a trust, this is the absolutely most important area in which the advice and

assistance of professional legal counsel is imperative. Mr. Shepard has reviewed hundreds if not thousands of do-it-yourself trusts and not a single one of them did not contain major flaws. Even a lawyer who advertises some low flat rate price is providing you a real disservice.

### **What is probate and why would I want to avoid it?**

Probate is the court-supervised process by which your assets are gathered up and inventoried, any debts you have are paid, and any remaining assets are distributed. Most people want to avoid it because it is expensive, time consuming and public. Probate is technically defined as the court procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a decedent is administered.

The main reasons to avoid probate are that it is expensive, time-consuming and become a public record. Its only benefit is court-supervision, which for most people is not a real benefit at all.

Under California Probate Code §13.100, if your probate estate if valued under \$100,000, your assets may avoid probate and be transferred by a declaration. Otherwise, in order to transfer title of any property the estate must pass through probate.

Probate is initiated by someone filing a probate petition, along with a copy of any will drafted by the decedent. The attorney representing the person named in the will to be the executor, or if there is no will, by the decedent's spouse or child, usually does this. Then copies of the petition are sent to everyone named in the will as well as all the intestate heirs. Also, a copy of the petition must be published in a local newspaper. Four to six weeks after the petition is filed with the court, the court holds its first meeting to determine who shall be named the executor or administrator (an administrator works just like an executor but is the term used if there is no will) of the estate. Once this person is finally chosen, anyone who believes the decedent owes them money must file a creditor claim. The executor then has the job of marshalling the decedent's assets, and evaluating the creditor claims. The valid claims are paid and they may or may not be litigation over disputed claims. Once all the claims are paid, all the assets have been properly appraised and evaluated, and any challenges to the will itself have been resolved, the Executor or Administrator then proposes to the court a distribution plan. Once the court approves it, the estate is distributed and probate is finally closed.

### **How expensive is Probate?**

The very short answer – estimate about 8% of your estate. Probate consists of court fees, fees for the attorney and fees for the executor. The costs vary depending upon the complexity of the assets, but include filing fees, publication fees, probate referee fees, bond fees, appraisal fees,

moving fees, storage fees, etc. A rough estimate of 2% of the size of the estate works pretty well for an average estate, but closer to 4% for smaller estates. The attorney fees and executor fees are fixed by California law, which generally provides for a graduated fee depending upon the size of the probate estate.

The size of the probate estate is the full fair market value of all the assets, regardless of any liens or mortgages on the assets. Once the value of the probate assets are computed, both the Attorney and the Executor each get:

- A. 4% of the first \$100,000
- B. 3% of the next \$100,000
- C. 2% of the next \$800,000
- D. 1% of the next \$9,000,000
- E. 0.5% of the next \$15,000,000
- F. Over \$25 million a “reasonable” amount to be determined by the court.

Let’s look at an example to see how this might work.

*John owns a house worth \$500,000 with a first mortgage of \$300,000. The probate court is not concerned that John only has \$200,000 of equity, the value of the asset is \$500,000. Lets say this is John’s only major asset, but in addition to the \$300,000 mortgage, he has \$20,000 of credit card debt. The probate estate is valued at \$500,000, so the costs would roughly be \$10,000, the minimum attorney fee would be \$13,000, and the minimum executor fee would be \$13,000. Of John’s \$500,000 home, you must subtract \$356,000, which means only \$144,000 will be distributed. The \$36,000 of probate costs and fees could have been completely eliminated with proper estate planning.*

Some other short examples:

<u>Value of Probate Estate</u>	<u>Estimated Costs of Probate</u>
\$250,000	\$21,000
\$2,500,000	\$126,000
\$25,000,000	\$876,000

The estate is valued by a probate referee and may be challenged by any interested creditor. It also becomes the tax basis for determining future capital gains taxes, if any. If complications arise during the probate process, the attorney may ask for more money. The above chart shows the statutory minimums. Probate is a complicated process. It is highly technical and procedurally difficult. Mistakes can cost money and time. A skilled attorney can shepherd a probate through the system with the least problems and expense.

### How long does Probate take to complete?

Each estate is different depending on the complexity but there are certain guidelines. Creditors have a minimum of four months to file creditor claims once the probate petition is filed. In our

experience, a very fast probate takes eight months, assuming the assets are fairly well organized and there are no challenges. Larger estates always take longer, up to several years. If a will contest exists, then the probate will continue until the challenge is resolved. Extreme cases can go on for a decade.

During the probate process, nobody has access to any of the assets until an executor is named. When a will contest is involved, it is often this very issue which is fought over. Even once an Executor is named, only they have access to the probate estate, and they may only use it for purposes of completing the probate process. If they distribute any assets to anyone before the judge approves the final process, even if the person being distributed to is the ultimate beneficiary of that property, then the Executor may be held personally liable. The probate assets do not become the property of the beneficiaries until the probate process is complete and the judge approves the final distribution. Who hasn't lived in a neighborhood where a house sits empty for years while the heirs fight it out in probate court. Probate is easily avoided with proper estate planning, so don't let this happen to your house.

### **Do the Probate records become a matter of public record?**

Yes, everything filed with the probate court is openly assessable to anyone wishing to view it. This will include a copy of your will, along with an inventory and appraisal of all the probate estates assets and debts. Not only is it filed with the court, it must be mailed to all the beneficiaries, family members and all reasonably ascertainable creditors. Often just the receipt of such a notice is seen by some as an invitation to challenge the will in one way or another. On the other hand, a living trust avoids probate and remains confidential as long as no one contests or otherwise challenges the terms of the trust.

### **How does an estate plan effect taxes?**

In addition to your annual tax return, when you die you are subject to the Federal Estate Gift Tax. This is completely different from probate costs. Probate costs are based on the value of the assets in your probate estate. Death taxes are based on the size of your gross estate. This is a rapidly changing area of law, but currently only a concern for very wealthy people. The Law Office of Robert L. Shepard will identify if your estate might be subject to this tax, and will provide multiple strategies to avoid or reduce your tax burden. These strategies commonly include:

- A. **Gifting Plans:** You can transfer \$11,000 per person per year tax-free. So you can decide who your beneficiaries will be and start making annual gifts to them to reduce the size of your gross estate. Gift of \$10,000 to ten people for ten years reduces your overall estate by \$1,000,000, which would save you roughly \$500,000 in Federal Estate Tax. You can also give fractional shares of real estate or business interests that are worth more than \$11,000 on a pro rata basis, but are reduced in fair market value because of their fractional nature. This is a more aggressive gifting plan only appropriate for specific estates.
- B. **Charitable Giving:** By making charitable donations upon death, you again reduce your ultimate tax by half of what you give. Large charitable donations are a centerpiece of

estate tax planning, and if the death tax was to ultimately be eliminated, charitable organizations that rely on these gifts would be too. There are also something called Charitable Remainder Trusts that enable you to many of the tax benefits while enjoying the lifetime income of the trust.

- C. Irrevocable Life Insurance Trusts: Working together with a financial planner we estimate what your ultimate tax liability might be. Then, whole life insurance is bought and placed inside this very specialized trust so that when you pass, the trust money is not added to your gross estate for Federal Estate Gift Tax purposes and is then used to pay the tax based on the remainder of your estate.

These are the tried and true methods. Large law and accounting firms come up with new theories all the time, always proprietary, always expensive. Sometimes they work for a few years until the I.R.S. eventually closes them down and new ones are opened. We believe your estate is too important to become a test case for the U.S. Tax Court, so we neither create nor offer opinions on such plans.

### **How can Estate Planning help me set aside funds for my children?**

Having children is a very important reason to do some estate planning. Without it, the money will be given to a guardian for their benefit and the child will receive it outright at age 18 under the California Uniform Transfers to Minors Act. Of course, before they are 18 they handling of the money requires a lot of government supervision, and that is not cheap.

Many people feel it is wiser to delay distribution until the child is older, or to spread out the distribution more evenly over time. With the creation of a trust, you can make sure their basic life needs are provided for, but hold off distribution of additional assets until they reach a later age, or when a certain condition is met, such as they graduate college, or have a child of their own. It's your assets, you can decide not only who but also when they receive them. You can give the trustee of such a trust a little or a lot of discretion on how the money should be used.

### **How can Estate Planning help my beneficiaries avoid confrontation?**

There are many ways an estate plan can help avoid confrontation and/or litigation over the distribution of the assets. Just about everyone you talk to has a horror story from his or her family or a friend who had a nightmare experience in probate. Common things done as part of the estate plan to avoid problems are:

- A. Making effective use of will substitutes such as living trust. A trust can be challenged on the same grounds as a will, but while in a book they appear identical, in the real world it makes a world of difference. Why? Using a will substitute, assets transfer immediately at death. You usually only need a death certificate to change title, which can happen in a few days. Once title is transferred, the money can go straight to Las Vegas for all you know. Under a will, the assets are held in the decedent's estate. The

- estate can use the estate's money to defend itself from any challenges, while you have to pay a lawyer by the hour. Challenging a trust is therefore much more difficult.
- B. Videotaping the execution of the documents. This eliminates or at least reduces the effectiveness of any contest based on undue influence. The videotape will show that the testator signed the document without anyone holding a gun to their head or forcing them to do it. It can also show the testator's capacity.
  - C. Preparing a letter of explanation for the testator's motivation behind the particular distribution scheme chosen. When your chosen plan deviates widely from your intestate heirs, the court becomes more suspicious. It's not that you can decide who gets your assets, it is just that the court thinks there are natural objects of your bounty. If you disinherit a child for example, it is important to explain why. Maybe they already have sufficient assets of their own, maybe you think someone else is more deserving, maybe you just do not like them. Whatever your rationale, it is important to give the court insight to your intent if you want the court to honor your wishes.
  - D. Having your medical doctor perform a competency exam just prior to execution of the documents. This is an excellent way to defend against a challenge based upon lack of testamentary capacity.
  - E. Having longtime friends act as witnesses to the documents. This is also an excellent way to defend against either undue influence or lack of testamentary capacity, because your longtime friends presumably know you well enough to know if you were acting oddly, etc at the time the will was signed.
  - F. Using a No-Contest clause. This is a clause in a will that says something to the effect of: "Anyone challenging this will forfeits anything they might otherwise have received by this will." In other words, if they challenge and lose, then they are disinherited. Not this only works if you are leaving the party something. Let's say you had two children, and wanted to leave 60% of your estate to one, and 40% to the other. The one receiving the 40% might challenge out of spite. With a no-contest clause, presumably they would not challenge unless they believed they had a really strong claim.

### How can Estate Planning protect my assets from creditors?

Depending on the goals of the client and the nature of the creditors, many types of trust, usually irrevocable in nature, can be created to protect the transferred assets from creditors either of yourself or your intended beneficiary. The general rule is that if you cannot access the assets, then neither can your creditors.

A common scenario where this arises is in the creation of a spendthrift trust. Let's say you want to leave your assets to your child, but unfortunately your child did not inherit your financial savvy. If your child has lots of debt, be it from credit cards, to back taxes, student loans, to child support obligations, even civil judgments, if you gave your child the asset it would simply get gobbled up by these creditors. Your goal is to provide for your child's life necessities, not pay their old debts. So you create a spendthrift trust wherein the trustee (usually a professional trustee in this type of scenario) distributes only small portions to the beneficiary at a time. The

amounts are simply enough to cover the basics. Your child cannot access the trust money, so neither can the child's creditors. The money that is slowly distributed to the child usually

qualifies as exempt, and so the creditors are left waiting. Just in case you were thinking ahead – No, you cannot create a spendthrift trust with yourself as beneficiary.

### **Can I create a Trust to help support other members of my family?**

Yes, there are Support Trusts used to provide for the care of another, most often a parent or spouse, and Special Needs Trusts used to provide care for minor and adult children with disabilities. These types of trusts are highly specialized but allow you to ensure that your money is used for their care in a manner that you see fit. These types of trusts also can have significant tax advantages for the creator of the trust, called the Settlor. These types of trusts are so specific in nature that general comments about them are impractical.

### **What assets are managed by the Estate Plan?**

To make the most effective estate plan possible, all your assets and debts must be considered, both past and future outlook. Different assets work differently, some will be governed by a trust, some by a will, and some by other will substitutes. To simply sell someone a single document without looking at the entire picture is a huge disservice. What assets are managed by your estate plan is entirely up to you, but ideally all your assets have been considered.

Keep in mind the difference between your probate estate, which only consists of assets passing through probate, and your gross estate, which consists of your probate estate as well as assets under will substitutes.

### **Who should I select to be my Executor or Trustee?**

This is an important decision. Sometimes it is best to nominate a family member, but in other instances professionals are better suited. The most important characteristic is someone you trust, and as long as they have basic financial skills that is generally fine. There are many criteria to consider when selecting an Executor or Trustee.

The first decision to make is whether to hire a professional or have someone close to you serve. A professional trustee is most appropriate for either very large or very technical trusts. When a large sum of money is at stake, more people will watch more closely to see if anything is incorrect. This can be a terrible burden on an individual, but a professional is equipped and organized to handle it. Professionals also have better resources in which to stay current with changes in the law and financial markets. The great drawback to professionals is that they are very expensive. Contact any bank and ask them what they charge for their professional trustee services. They will send you a brochure that only a Trust Attorney or CPA could understand. The short answer – they are very expensive, \$300 an hour and UP! Individuals work fine in most common scenarios, particularly if you are leaving the bulk of your estate to a single person. In that instance, having that person serve is a natural choice.

Consider several options and talk to that person. You may be surprised to learn they don't want to serve in that capacity.

You should also consider if you want this person to be bonded. A bond is an insurance policy so that if the Executor or Trustee makes any mistakes, the insurance company pays the

estate back. The down side to requiring a bond is that the estate pays it for. Like many types of insurance, it is only good if something goes wrong.

### **Should I agree to serve as an Executor or Trustee?**

It is up to you, but make sure you know what you are getting into. An Executor or Trustee is generally compensated for their time and effort, but if you make mistakes, you may be held personally liable. If you do agree to serve in this role, having a competent attorney is absolutely necessary. Agreeing to be an Executor or Trustee is not a decision to be taken lightly. How big of a job it is depends on several factors:

- A. How much property is involved.
- B. How long the process is likely to take.
- C. Whether there might be parties who question your decision.
- D. Whether there are special considerations such as the care of under-age children or incapacitated parties.

As a fiduciary (both Executor and Trustee are in a fiduciary relationship with the beneficiary), you may be required to:

- A. File a will with the court to initiate the probate process.
- B. Locate and take control of assets.
- C. Run a business or hire a manager.
- D. Assume responsibility for the care of children or incapacitated parties.
- E. Pay debts and collect proceeds of insurance policies.
- F. Sell assets not used and reinvest the assets wisely.
- G. File tax returns and prepare accountings for the probate process.
- H. Distribute the assets to the beneficiaries.

The point is, if you are going to agree to serve in one of these roles, make sure to hire an attorney. The estate you are serving will pay for it, and having an attorney can keep you from breaching any number of fiduciary duties the court will hold you to.

### **What if there are changes after the Estate Plan has been drafted?**

Most estate planning documents are revocable and can be easily changed. Many law firms charge large fees for any further changes, however, The Law Office of Robert L. Shepard maintains your client files perpetually, and never re-bills for work already performed. Most changes can be made in just a few minutes, and that is all you will be billed for.

Ideally, your estate plan is drafted so well the first time that no changes are ever required. However, with even the best plan, the law can change, or the people you want to be your

beneficiaries can change. People marry, divorce, have children, people die, life is full of change. Our general advice is to review your estate plan every five years or after any big change in your life. This review service is something we offer all our clients free for life.

### How can I challenge the validity of another's Estate Plan?

There are a few basic ways for challenging any particular document, but they generally fall into three categories: a) lack of capacity – meaning you did not have a mental capability to make the will in the first place, b) undue influence – meaning the estate plan is a reflection of another person's wishes, not yours, and finally 3) fraud – meaning someone tricked you into executing the estate plan.

**1. Lack of Testamentary Capacity:** Testator must be over the age of 18, understand the nature and extent of his property, the nature and objects of his bounty, and the nature of the disposition he is making.

If the testator has a conception of reality that has no real foundation, to which the testator adheres, and no rational person could have reached the same conclusion as the testator, then the testator is said to suffer from an insane delusion. The party making the claim of insane delusion has the burden of proof, and must show the insane delusion caused the actual disposition.

A successful challenge on the grounds of lack of testamentary capacity can void whole or part of the will.

**2. Undue Influence** is defined as a mental or physical coercion that deprives the testator of his "free agency," causing him to substitute another persons will for his own, can void whole or part of the will. Undue influence requires that the testator be susceptible to influence, the other person had the opportunity to influence, the other person be disposed to influence, and provisions of the will are irregular.

A presumption of undue influence arises if the beneficiary was in a confidential relationship with the testator, the beneficiary participated in the execution of the will, and the provisions appear irregular.

**3. Fraud** is defined as an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Any gift resulting from fraud is invalid. Fraud must be produced by the beneficiary and only that beneficiary's interest will be invalidated, meaning the other provisions in the will or trust will remain valid and enforceable.

### Where should I keep the Estate Plan documents?

You want to keep the original documents in any safe place other than your bank's safety deposit box. The Law Office of Robert L. Shepard is happy to maintain your original documents in our fireproof safe free for life, but most clients simply keep their originals in a pile of important papers someplace in the house.

The court always requires the original documents during your probate process. This is to help prevent fraud and forgery. If your original is in your bank's safe deposit box, they will not allow anyone else to open it without a court order. The court will not issue an order without seeing the original will to name the executor. There is a special solution for this all too common problem, but it is additional time and expense that can so easily be avoided.

Wherever you keep your originals, it is generally advisable that your Executor and Trustees have copies as well. It is also a good idea to tell those people, as well as your attorney, where the originals are kept. That way, when the time comes, the right person can find them and put the documents to work.

It is a personal choice to give copies to your beneficiaries.

### Who should know about the Estate Plan?

It is important that your Executor and/or Trustee along with the backup person know and have a copy of these documents. It is often a good idea to tell these people where you keep the original documents as well. Talking to others about your estate plan can be even more uncomfortable than initially putting it together. However, by having that awkward discussion now, it gives people a chance to understand (and hopefully honor) your wishes. There are no guarantees, but if people have the chance to understand why you are doing whatever you are doing, they are a lot less likely to be hostile towards it.

### What needs to happen when a loved one passes away?

Death can take a tremendous toll of a family. In addition to the emotional turmoil, survivors must deal with a number of financial and tax issues, some of them mundane and some quite complex. The Law Office of Robert L. Shepard provides care and guidance to ease your stress and confusion during probate and estate administration.

The first comment here is that there is no need to rush through all the whole paperwork and start tracking down the assets. This work takes lots of phone calls and digging during a time of bereavement. Waiting a little while doesn't change anything other than giving you time to grieve and allowing you to weight the options and make better decisions when you do go through the paperwork.

The most immediate tasks when someone dies are to make the final arrangements and to notify others of the death. If your parent left specific funeral and burial instructions, with a list of people to be notified, your job is that much easier. If not, you'll need to consult with other

family members and look for address books that can help you with your task. Most people contact a funeral home for help with arrangements. If your parent was religious, call the pastor, priest, rabbi or other religious leader for guidance.

Once these first steps are completed, it is a good idea to order several certified copies of the death certificates. How many varies, but I tell most of my clients to start with six. More can

always be ordered later if necessary. Now is also a very good time to take others up on their offers of help.

Although not everyone is sincere who murmurs, "Let me know if there's anything I can do," most people would be pleased to have a concrete way to show love and respect for the deceased -- and for the survivors. Family members or close friends, for example, can divide up the list of people to notify about the death and make the calls. Someone who doesn't mind missing the funeral could stay at the house as a security measure while the service is taking place. (Some burglars reportedly read the obits, looking for homes that are likely to be empty during the funeral.) Whatever you need -- help cleaning the house, a sitter to look after your kids, a new home for the deceased person's plants or pets -- chances are someone close to you or to the deceased is willing to provide these things.

Your parent probably was receiving income from somewhere -- an employer, a pension, the Social Security Administration, or perhaps all three. Legally, they need to be told of the death. If your parent was employed or receiving a pension, you should notify the company's human-resources department within a few days of the death. This also will start the process of collecting any life insurance, accrued vacation pay or other benefits the employer may owe the family. If your parent received Social Security checks, you'll want to inform the Social Security Administration promptly. The administration is wary of fraud, and you could be in for a nasty battle if checks are issued after your parent's death. If your parent was receiving other government or health services, such as Medicaid or hospice care, these agencies should be notified as well.

Now time for paperwork you'll need to track down, including wills, trusts, insurance policies, investment accounts, business and partnership arrangements, credit-card statements and other evidence of assets and liabilities. Unless your parent had a large or complicated estate, you probably can take your time pulling this information together. However, if your parent owned a business or was in the midst of a complicated transaction -- selling a home, for example, or setting up an estate-planning trust -- you may need to work more quickly. If your parent had financial advisers -- accountants, attorneys, real estate agents, insurance agents -- it's smart to contact them and ask if any matters need to be taken care of immediately.

Usually, one person supervises the tasks of settling an estate. If your parent had a will or a trust, it should specify who is to serve as the executor or personal representative (or, in the case of a

living trust, the successor trustee). The person named is responsible for making sure creditors are paid, assets are distributed and estate tax returns are filed. This is usually the person who will investigate what benefits or insurance proceeds, if any, are owed to the heirs. If your parent

died without a will or trust, the laws of your state typically indicate who's in charge: usually a surviving spouse, if there is one, or an adult child or parent. A court hearing will be held to

appoint someone, and there could be a battle if more than one person wants the role. That's why it's so important to have a will or trust, since such court proceedings are a time-consuming and unnecessary expense. If you are the person selected and don't feel up to the task, you can always decline. But remember that you are allowed to hire professional help for the work ahead -- and that if you proceed, you probably should.

Questions will come with even the simplest estate, so it's smart to hire someone who understands the process and who can give you good advice. An accountant may be all you need for a smaller estate, although you'll probably also require an attorney if your parents' assets were worth \$100,000 or more. An accountant, for example, can help put together the financial snapshot of assets and liabilities that's needed when settling an estate and offer advice about the tax consequences of transferring assets. An attorney is all but required if your parent's estate was large enough to incur taxes or if your parent left a lot of debt. Deciding which creditors should be paid, and when, can be one of the trickier parts of settling an estate.

There's nothing quite like a death in the family to make you think about your own mortality. Instead of wallowing, however, you could turn these thoughts into positive action by making your own arrangements.